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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LANDRUM, SR.,

Defendant and Appellant.

B232289

(Los Angeles County
Super. Ct. No. NA082726)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charles D. Sheldon, Judge. Judgment of conviction affirmed and remanded for
resentencing.

Linn Davis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and
Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant James Landrum, Sr., of one count of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2)¹ (count 1); one count of attempted willful, deliberate and premeditated murder in violation of sections 664, 187, subdivision (a) (count 2); and one count of possession of a firearm by a felon in violation of section 12021, subdivision (a)(1) (count 4). The jury found true with respect to count 1 that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a). In count 2, the jury found that defendant personally used and discharged a firearm within the meaning of section 12022.53, subdivisions (b) through (d).

The trial court sentenced defendant to state prison for 35 years to life. In count 2, the trial court imposed life in prison with a mandatory minimum of seven years, plus 25 years to life for the section 12022.53, subdivision (d) enhancement. In count 1, the trial court imposed the midterm of three years, to run consecutive to the sentence in count 2. In count 4, the trial court imposed eight months (one-third the midterm of two years), to run concurrent to the sentence imposed in count 2. The trial court awarded defendant a total of 600 days of presentence custody credit, consisting of 600 days of actual custody and no days for good conduct.

Defendant appeals on the grounds that: (1) the abstract of judgment must be corrected to accurately reflect the trial court's oral pronouncement of judgment; and (2) defendant is entitled to presentence conduct credits at 15 percent under section 2933.1.

FACTS

Because defendant has raised issues related only to sentencing, an abbreviated statement of facts is sufficient. On July 22, 2009, defendant and David Boardley, who knew each other from prior drug transactions, became involved in an altercation in the courtyard of defendant's apartment complex. Defendant punched Boardley, and the two men began physically fighting. At one point, defendant told Boardley he was going to

¹ All further references to statutes are to the Penal Code unless stated otherwise.

get his gun. Boardley got up and ran out of the apartment complex. Defendant came out of a door carrying a gun and pursued Boardley as he ran out the gate of the complex and up the sidewalk. Defendant fired a shot at Boardley, but the bullet struck and injured a child, Josue, who was playing on the sidewalk with his sister, Katherine.

DISCUSSION

I. Errors in Abstract of Judgment and Sentencing

A. Defendant's Argument

Defendant asserts that, although the abstract of judgment shows a seven-year sentence for an enhancement under section 12022.5 in count 1, the trial court clearly stated in its oral pronouncement of judgment that it was not imposing the firearm-use enhancement in count 1.

B. Relevant Authority

Section 12022.5, subdivision (a) provides: "Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

C. Proceedings Below

The trial court noted at sentencing that the sentence in count 2, the attempted deliberate and premeditated murder, was a life sentence with a minimum sentence of seven years, and it carried a 25-to-life sentencing enhancement under section 12022.53, subdivision (d). The trial court asked the prosecutor whether he believed that in count 1 (the assault with a deadly weapon on Josue), the additional time for the use of the firearm need not be imposed since it was the same event. The prosecutor stated that the trial court could use its discretion but urged the court to impose the enhancement. The trial court ultimately stated, "I'm going to give consecutive, the mid-base term on count 1, but not impose the 12022.5, same gun. Not the three, not the four, not the 10." Thus, the trial court imposed a sentence of 32 years to life in count 2, a consecutive three years in count 1, and a concurrent eight months (one-third the midterm) in count 4.

D. Abstract Incorrect; Remand Required

Defendant is correct that the abstract of judgment must be amended to conform to the trial court's oral pronouncement of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [it is important to correct errors and omissions in abstracts of judgment].) In addition, an unauthorized sentence cannot be imposed and may be corrected at any time, with or without objection below. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

The abstract of judgment reflects the correct sentence in count 2. In count 1, the abstract also correctly shows a consecutive sentence of three years, as the trial court imposed. In count 4, however, it shows a concurrent sentence of two years rather than the eight months that the trial court imposed. The abstract also shows a consecutive seven-year sentence in count 1 for the firearm-use enhancement under section 12022.5, which the trial court did not impose.

Contrary to defendant's argument in his opening brief, however, the abstract of judgment cannot merely be amended to correct what he characterizes as clerical errors. And section 654 does not preclude punishment in count 1 for personal use of a firearm under section 12022.5, as he alternatively argues. (See *People v. Oates* (2004) 32 Cal.4th 1048, 1065 [implicit in the holding of *In re Tameka C.* (2000) 22 Cal.4th 190 "is our conclusion that section 654 does not preclude imposition of multiple enhancements for a single firearm use involving multiple victims"].) As respondent contends, the trial court was obliged to impose the firearm enhancement under section 12022.5, subdivision (a) in count 1. The imposition of the enhancement under section 12022.5, subdivision (a) is mandatory. (See *People v. Ledesma* (1997) 16 Cal.4th 90, 100-102; *People v. Turner* (1998) 67 Cal.App.4th 1258, 1269 [failure to impose mandatory enhancement results in an unauthorized sentence].)

Defendant apparently concedes the issue in his reply brief, stating that "once the trial court imposed a consecutive three-year sentence on the assault, there was no way it could impose what it believed to be the appropriate sentence in this case because it was required to impose the section 12022.5 enhancement, which would add at a minimum,

another 3 years to the sentence.” Defendant urges that the trial court could achieve its desired sentence by imposing a concurrent rather than a consecutive sentence in count 1 and the accompanying firearm-use enhancement. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311 [personal firearm-use enhancements are necessarily attached to their underlying felonies].) Both parties agree that the matter must be remanded for resentencing. Given the nature of the errors in this case, we agree that the matter must be remanded so that the trial court may exercise its discretion where appropriate. (See *People v. Irvin* (1991) 230 Cal.App.3d 180, 192-193 [“As a result of the trial court’s imposition of an unauthorized sentence, the appropriate course of action is to remand this case to the trial court” to exercise its discretion in resentencing].)

II. Credits

The abstract of judgment indicates that defendant received 600 days of actual presentence credits and no days of local conduct credits. Defendant contends that, under section 2933.1, defendant is entitled to conduct credits of 15 percent of the actual days. Respondent agrees.

Section 2933.1 provides that “any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit.” Among the violent felonies listed in section 667.5, subdivision (c) are any felony punishable by life imprisonment, attempted murder, and firearm enhancements under section 12022.53, subdivision (d) (§ 667.5, subd. (c)(7), (12), (22).) Therefore, the trial court should have awarded defendant 90 days of conduct credits (15 percent of 600 actual days).

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for resentencing, including correction of the number of credit days awarded.

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_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ